IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, EMMANUEL BAPTIST CHURCH, NEW OXLEY HILL BAPTIST CHURCH, BETHEL A. BAPTIST CHURCH, COVENANT PRESBYTERIAN CHURCH, CLINTON TABERNACLE AME ZION CHURCH, BARBEE'S CHAPEL MISSIONARY BAPTIST CHURCH, INC., ROSANELL EATON, ARMENTA EATON, CAROLYN COLEMAN, BAHEEYAH MADANY, JOCELYN FERGUSON-KELLY, FAITH JACKSON, and MARY PERRY, Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, KIM WESTBROOK STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections, JOSHUA B. HOWARD, in his official capacity as Chairman of the North Carolina State Board of Elections, RHONDA K. AMOROSO, in her official capacity as Secretary of the North Carolina State Board of Elections, JOSHUA D. MALCOLM, in his official capacity as a member of the North Carolina State Board of Elections, PAUL J. FOLEY, in his official capacity as a member of the North Carolina State Board of Elections and MAJA KRICKER, in her official capacity as a member of the North Carolina State Board of Elections, Defendants.	**PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS** **Case No.: 1:13-CV-658**

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, A. PHILIP RANDOLPH INSTITUTE, UNIFOUR ONESTOP COLLABORATIVE, COMMON CAUSE NORTH CAROLINA, GOLDIE WELLS, KAY BRANDON, OCTAVIA RAINEY, SARA STOHLER, and HUGH STOHLER,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, JOSHUA B. HOWARD in his official capacity as a member of the State Board of Elections, RHONDA K. AMOROSO in her official capacity as a member of the State Board of Elections, JOSHUA D. MALCOLM in his official capacity as a member of the State Board of Elections, PAUL J. FOLEY in his official capacity as a member of the State Board of Elections, MAJA KRICKER in her official capacity as a member of the State Board of Elections, and PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina,

Defendants.

Case No.: 1:13-CV-660

UNITED STATES OF AMERICA,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and KIM W. STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants.

Case No.: 1:13-CV-861

INTRODUCTION

In response to League of Women Voters ("LWV") Plaintiffs' First Requests for Production to Defendant the State of North Carolina (hereinafter, the "RFP"), Defendants have produced no responsive documents beyond an earlier production consisting largely of publicly-available materials such as legislative transcripts. Instead, Defendants have asserted the same broad objections of relevance and legislative immunity and privilege to LWV Plaintiffs' RFPs that they raised in their motion to quash NAACP plaintiffs' subpoenas to legislators.

The documents Plaintiffs requested are highly relevant, discoverable and uniquely probative of legislative intent. Plaintiffs challenge provisions of HB 589 on the basis that the Legislature enacted HB 589, in part, to discriminate against African-American voters, in violation of Section 2 of the Voting Rights Act and the Equal Protection guarantees of the Fourteenth Amendment. *See* Complaint, Dkt. No. 1, ¶¶ 79, 86. The documents Plaintiffs seek from Defendants relate to the circumstances surrounding the General Assembly's enactment of HB 589 and legislators' motivation for the enactment, a key issue in proving the Constitutional and statutory violations.

Despite the relevance of the requested documents and Plaintiffs' clear need for these documents, counsel for North Carolina has asserted that Defendants are immune from production of all documents in the custody of legislators and exempt from producing nearly all documents in a third party's custody created by a legislator. Defendants' theory of absolute legislative immunity and extraordinarily broad legislative privilege goes far beyond any applicable Court decision and, for example, beyond the scope of documents exempt from disclosure in response to public records laws. Defendants' position would prevent the disclosure of documents in the custody of legislators and other public officials only when plaintiffs are seeking to use those

documents in a federal lawsuit, thereby limiting any effective recourse in the Federal Courts to discriminatory denials of the fundamental right to vote.

For the reasons described below, Plaintiffs in *League of Women Voters of North Carolina, et al. v. North Carolina* (the "LWV Plaintiffs"), respectfully request that the Court issue an order directing Defendants to produce:

(1) Documents responsive to LWV Plaintiffs' first requests for production; and

(2) A privilege log identifying all responsive documents for which Defendants claim a privilege and the specific grounds claimed for such privilege.

BACKGROUND

The LWV Plaintiffs served a request for production on Defendant the State of North Carolina, directed to documents in the custody of members of the North Carolina General Assembly, on December 20, 2013. *See* Ex. A, LWV Plaintiffs' First Set of Requests for Production to Defendant State of North Carolina ("RFPs"). The RFPs request documents related to the information available to legislators and the circumstances surrounding the passage of HB 589. For example, LWV plaintiffs request: communications between legislators and lobbyists, members of the public, election officials or executive officials which took place during their consideration of HB 589, *see* RFPs 4, 6, 8; analysis, estimates, reports or studies legislators may have considered during the enactment of HB 589, *see* RFPs 5, 10, 16, 17, 18; assessments of voting patterns by race or of the impact HB 589 would have on African-American voters that legislators may have reviewed related to the enactment of HB 589, *see* RFPs 3, 12; and requests for reports of long lines or complaints of voter fraud that legislators would have been aware of when considering enacting HB 589, s*ee* RFPs 13, 14.

Defendants served written responses to those requests on January 22, 2014. *See* Ex. B,

Defendant North Carolina's Objections and Responses to Plaintiffs' First Set of Requests for Production ("RFP Responses"). Defendants' written responses lodged a common objection to virtually all requests, namely legislative immunity or confidentiality, and executive, legislative and attorney-client and/or work product privilege. *See* RFP Responses. In response to sixteen of LWV Plaintiffs' twenty RFPs, Defendants refer Plaintiffs to Defendants' initial disclosures as the only documents outside the scope of their objections.[1] To date, Defendants have not produced any documents in response to the RFPs and have produced no non-public documents from General Assembly members.

Defendants' unwillingness to produce *any* documents from legislators and legislative staff was made clear in both their objections to the RFPs and in their motion to quash the NAACP Plaintiffs' subpoenas to legislators, filed on January 20, 2014. *See* Memorandum in Support of Motion to Quash Subpoenas to State Legislators, Dkt. No. 58 (hereinafter the "Motion to Quash"). The parties held a meet-and-confer telephone conference on January 23, 2014 and again on January 30, 2014. On the January 30, 2014 conference, Defendants clarified their position that they are asserting separate objections to producing documents based on (1) "legislative immunity" and (2) "legislative privilege." Specifically, Defendants (1) refuse to produce any documents or a privilege log for documents in the custody of General Assembly members or legislative staff based on a claimed "legislative immunity," and (2) refuse to produce

[1] Defendants have not produced any documents in response to the other four RFPs. In response to Plaintiffs' request for documents concerning procedural irregularities in enacting HB 589 (RFP 11), Defendants respond that they are unaware of any responsive documents and produced nothing. In response to Plaintiffs' requests for documentation of complaints of long waiting times at polling places (RFP 13), Defendants claim they are unaware of any responsive documents but will continue to search, yet have produced nothing. In response to Plaintiffs' requests for documents related to the General Assembly's plans to educate the public on HB 589 (RFP 15), Defendants assert that responsive documents will be published to the public on the State's website, but again produce nothing. In response to Plaintiffs request for legislators' data retention policies (RFP 19), and without waiving immunity, confidentiality and privilege objections, Defendants respond that responsive documents, if any, will be produced, but have produced nothing.

documents in the custody of non-General Assembly members, but created or exchanged with General Assembly members, based on a claim of "legislative privilege." Despite Plaintiffs' best efforts, the parties were not able to resolve their disagreements regarding Defendants' refusal to produce documents responsive to the RFPs.

In light of the Court's scheduled hearing on Defendants' Motion to Quash, which raises the same issues concerning legislative immunity and legislative privilege presented in this motion, LWV Plaintiffs requests that the Court grant an expedited hearing on this motion, *see* Motion to Expedite filed herewith, to be scheduled at the same time as its hearing on the Motion to Quash.

ARGUMENT

The documents requested in the RFPs are relevant, discoverable and highly probative to the Constitutional and statutory claims at issue in this litigation. The principle of "legislative immunity" does not shield Defendants from producing any and all documents in the custody of state legislators. Furthermore, there is no applicable "legislative privilege" that shields from production documents that have been disclosed by a legislator to a third party non-legislator, merely because those documents were created by the legislator. To the extent that legislative privilege exists at all, such a privilege is qualified and would not apply to many of the documents responsive to RFPs, as any privilege was waived in regard to documents legislators exchanged with third parties. With regard to other documents for which Defendants' claim privilege, such as documents exchanged between legislators, Defendants must produce a privilege log so that the Court may determine whether the privilege should preclude disclosure. Finally, in this particular Voting Rights Act challenge, the qualified privilege should, on balance, yield to Plaintiffs' need for the documents.

I. The Legislators' Documents Are Relevant, Discoverable, and Probative

The Federal Rules of Civil Procedure permit Plaintiffs to access documents relevant to the enactment of HB 589. Rule 26(b)(1) broadly defines the scope of discovery: "Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." The documents related to the enactment of HB 589 created and in the custody of legislators from whom Plaintiffs seek production are relevant, discoverable, and highly probative of legislative intent. Plaintiffs allege that the Legislature enacted HB 589, in part, to discriminate against African-American voters, in violation of Section 2 of the Voting Rights Act and the Equal Protection guarantees of the 14th Amendment. *See* Complaint, ¶¶ 79, 86. Section 2 of the Voting Rights Act prohibits a State from imposing or applying any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race[,] color, [or language minority status]." 42 U.S.C. § 1973(a). Although "Congress made clear that a violation of § 2 c[an] be established by proof of discriminatory results alone," *Chisom v. Roemer*, 501 U.S. 380, 404 (1991), the statute also prohibits state officials from adopting voting laws or procedures that purposefully discriminate on the basis of race, or that were adopted to harm minority voting strength, *See Bartlett v. Strickland*, 556 U.S. 1, 10 (2009) (explaining that the 1982 amendments to Section 2 "added" a results standard to complement Section 2's existing intent standard).

Documents related to the circumstances surrounding the General Assembly's enactment of HB 589 and legislators' motivation for enactment can be highly probative of intent. An inquiry into the purpose of the enactment "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The purpose inquiry can include, among other things,

"[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body." *See id.* at 267-68. Overt racial statements, and other indications of racial bias from supporters of challenged legislation, can also provide decisive evidence of a Voting Rights Act violation. *See Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

Plaintiffs have the right to review the documents created or accessed by legislators and their staff, and communications sent and received by General Assembly members as part of their consideration of HB 589. Plaintiffs seek documents considered by General Assembly members to assess the information available to legislators and circumstances surrounding the enactment of HB 589. *See, e.g.*, RFP 5 (requesting communications related to reports, studies, or analysis of proposed election related legislation); RFP 10 (requesting documents related to estimates, reports or analysis of HB589's impact); RFP 18 (estimates or analysis relating to cost of administering elections pre-HB589); and RFP 17 (estimates or analysis relating to cost of administering elections following the enactment of HB 589).

Furthermore, Defendants cannot selectively claim legislative immunity to shield themselves from the production of all documents in the custody of legislators, and at the same time assert their position on the General Assembly's motivating purpose for passing HB 589. S*ee* Answer, Dkt. No. 26, ¶ 79 (denying that suppressing the turnout and electoral participation of African American voters was a motivating purpose behind the enactment HB589); and ¶ 71 denying that General Assembly members were made aware of the disparate negative impact that HB 589 would have on African American voters). If Defendants invoke legislative privilege to avoid discovery of evidence related to legislators' intent, the Court should not later allow

Defendants to raise justifications for enacting HB 589 at trial based on the same evidence. *See Small v. Hunt*, 152 F.R.D. 509, 511-12 (E.D.N.C. 1994) ("The 'at issue' doctrine is based on notions of fairness and truth-seeking. Selective use of privileged information by one side may 'garble' the truth." (citation omitted)); *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012) ("[O]nce the privilege is invoked, the Court should not later allow the proponent of the privilege to strategically waive it to the prejudice of other parties").

II. Legislative Immunity Does Not Prevent Production of the Requested Documents

Defendants severely overstate state legislators' "immunity," which does not exempt members of the General Assembly from producing any and all documents in their custody. Legislative immunity generally refers to a protection for legislators from civil liability. *See Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951) (finding that Congress did not intend for 42 U.S.C. §§ 1983 and 1985 to override the immunity from suit that state legislators hold at common law). While such immunity from civil liability is afforded to federal legislators by virtue of the Speech and Debate Clause of the U.S. Constitution, *see Gravel v. United States*, 408 US 606, 615 (1972), federal common law provides the only basis for immunity for state legislators, and defines the contours, if any, of a related privilege, *see Burtnick v. McLean*, 76 F.3d 611, 613 (1996).

Federal common law immunity from suit does not give rise to an absolute evidentiary privilege for state legislators. *See United States v. Gillock*, 445 U.S. 360, 374 (1980) (holding no legislative privilege for state legislators in federal criminal prosecution based on balancing of interests). Contrary to the Defendants' arguments in the Motion to Quash, neither the Supreme Court nor the Fourth Circuit have recognized an absolute legislative immunity for state or local legislators that could provide a blanket exemption that "forbids plaintiffs from seeking any production at all from the legislative movants." Motion to Quash, at 7. There is no absolute

evidentiary privilege for state legislators shielding them from all review of documents in their custody and Defendants cite no case where a Court has granted absolute immunity as broadly as Defendants' claim.

One North Carolina district court has explicitly rejected Defendants' argument for absolute legislative immunity. *See Small*, 152 F.R.D. at 513 (compelling production of documents, such as meeting minutes and data considered during deliberations, that were considered by General Assembly members during committee deliberations). In that case, the Court rejected North Carolina's argument that "[r]equiring a legislator to search for documents is contrary to the very principles which support legislative immunity from liability or being required to testify," holding instead that "[t]he primary purpose of legislative immunity is not to protect the confidentiality of legislative communications, nor is it to relieve legislators of the burdens associated with document production." *Id.*

Defendants rely heavily on a Fourth Circuit case, *Equal Employment Opportunity Commission v. Washington Suburban Sanitary Commission*, 631 F.3d 174 (4th Cir. 2011), which held that "[l]egislative privilege against compulsory evidentiary process exists to safeguard . . . legislative immunity," *id.* at 181. As explained below, however, any assertion of legislative privilege – as distinct from legislative *immunity* – is qualified and should yield in this case, *see infra*, Sec. IV. And, in any event, the Court in *Washington Suburban Sanitary Commission* did not hold that legislative immunity absolutely forbids any and all document production by legislators, as Defendants seek in this matter, but in fact compelled the legislators in that case to produce documents that were administrative in nature. 631 F.3d at 184-85 (allowing E.E.O.C. subpoenas for documents a public utility considered in enacting a hiring policy, including list of IT department employees, criteria in making employment decisions, records of allegations of age

discrimination, job descriptions for new positions, applications submitted for new positions). *Cf.* RFPs 3, 5, 10, 12 16, 17 (seeking production of analysis, estimates, reports, data tracking, studies or analysis legislators may have considered during the enactment of HB 589); RFP 13 (requesting documents related to complaints of long lines); RFP 14 (requesting documents relating to incidents of voter fraud).

In any event, a blanket immunity excluding relevant documents from federal litigation would leave plaintiffs with no effective recourse in federal court for Voting Rights Act or Equal Protection violations. Such a rule would also produce an absurd result in which legislators must produce documents in response to public records requests or state court litigation, but cannot produce the same documents under federal common law. There is no authority to support Defendants' assertions of absolute legislative immunity from discovery, and this Court should decline Defendants' invitation to create one out of wholecloth.

III. Legislative Privilege, Even if Available Here, is Clearly Inapplicable to Various Categories of Documents Requested by Plaintiffs

As distinct from legislative immunity from personal liability, common law legislative privilege may in some cases shield legislators from some discovery obligations with respect to pre-decisional, deliberative documents. Crucially, however, legislative privilege for state lawmakers is not absolute under federal common law, but instead is "at best one which is qualified." *Perez v. Perry*, No. 5:011-cv-00360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (citation omitted); *see also Gillock*, 445 U.S. 360. As explained, *infra*, Sec. IV, any assertion of legislative privilege must turn on a balancing test which, in this case, tips in favor if disclosure. But even before applying that balancing test, at least two categories of documents which Defendants seek to protect from disclosure lie wholly outside of any applicable legislative

privilege, and must be produced to Plaintiffs, namely: (1) documents that have been disclosed to third parties, for which any legislative privilege has been waived; and (2) non-deliberative documents which contain objective facts or information available to legislators at the time of their decision. Defendants must produce the documents that are categorically not privileged, and must produce a privilege log so that the Court can determine whether the qualified privilege applies to any of the remaining documents.

a. Documents that have been disclosed to third parties are not protected by legislative privilege and must be disclosed

Federal courts have held that any applicable legislative privilege is waived with regard to documents shared with third parties. "As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011) (citing *ACORN v. Cnty. of Nassau*, No. CV 05-2301, 2007 WL 2815810, at *4 (E.D.N.Y. Sept. 25, 2007); *see also Almonte v. City of Long Beach*, No. CV 04-4192, 2005 WL 1796118, at *3-4 (E.D.N.Y. July 27, 2005). Thus, "the legislative privilege does not apply" to any matter legislators discussed with those outside the Legislature, including "consultants," "experts," "members of Congress," or "lobbyists." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10 (citing *ACORN*, 2007 WL 2815810, at *4, *6; *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003)). "While legislators are certainly free to seek information from outside sources, they may not assume that every such contact is forever shielded from view. . . . [A] contrary ruling would allow a legislator to cloak any communication with legislative privilege by simply retaining an outsider in some capacity." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10 (quoting *ACORN*, 2007 WL

2815810, at *6) (internal quotation marks omitted); *see also Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11–CV–562, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011) ("The Legislature has waived its legislative privilege to the extent that it relied on such outside experts for consulting services"); *Rodriguez*, 280 F. Supp. 2d at 101 ("conversation[s] between legislators and . . . outsiders" are ones "for which no one could seriously claim privilege"); *Doe v. Nebraska*, 788 F. Supp. 2d 975, 987 (D. Neb. 2011) (deliberative privilege does not apply to documents shared with non-legislative members); *Favors*, 285 F.R.D. at 212 ("A legislator waives his or her privilege when the legislator publicly reveals documents related to internal deliberations").

Many of the RFPs request documents legislators shared with third parties which fall outside of legislative privilege, including communications with lobbyists and members of the public, *see* RFP 4, or communications with the North Carolina Board of Elections, *see* RFP 8. Legislators documents received from or shared with third parties are categorically non-privileged communications and the Court should compel Defendants to produce those documents without additional delay.

b. Non-deliberative documents are not protected by legislative privilege and must be disclosed

Plaintiffs' document requests include requests for non-deliberative documents similar to categories of documents for which the Fourth Circuit has allowed or compelled production. *See Wash. Suburban Sanitary Comm'n*, 631 F.3d 174 (allowing Equal Employment Opportunity Commission subpoenas for documents a public utility considered in enacting a hiring policy, including list of IT department employees, criteria in making employment decisions, records of allegations of age discrimination, job descriptions for new positions, applications submitted for

new positions); *see also Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10 (finding that while legislative privilege provides some protection, "[i]t does not protect facts or information available to lawmakers at the time of their decision"). Many of the documents requested by Plaintiffs largely seek non-deliberative, objective, factual data, similar to the documents produced in *Washington Suburban Sanitary Commission*. *See, e.g.*, RFP 13 (requesting documents related to complaints of long lines); RFP 14 (requesting documents relating to incident of voter fraud); RFP 15 (requesting documents relating to plans and efforts to educate citizens on HB 589). These reports are categorically non-privileged and the Court should compel Defendants production of those documents without additional delay.

c. Defendants' Assertions of Legislative Privilege Cannot Be Substantiated without a Privilege Log

It is improper for Defendants to assert blanket legislative privilege for all documents in the custody of all General Assembly members and all legislative staff. Federal Rule of Civil Procedure 45(d)(2) requires that privilege claims be stated with clarity and specificity: "A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." Moreover, legislative privilege is individually held, and must be waived or asserted by each individual legislator. *See Perez*, 2014 WL 106927, at *1 ("The legislative privilege is a personal one and may be waived or asserted by each individual legislator." (*citing ACORN*, 2007 WL 2815810, at *2)).

Defendants must produce a privilege log identifying all responsive documents and specific grounds for the claimed privileges. Neither legislative immunity nor legislative privilege precludes production of the requested documents. However, disputes over legislative privilege in regard to particular documents or categories of documents cannot be resolved by the Court absent a privilege log. *See, e.g.*, *Favors*, 285 F.R.D. at 223-24 (ordering production of a privilege log to support claim of legislative privilege). Defendants' tactic of unilaterally withholding all responsive documents based on a broad claim of legislative immunity and privilege prevents Plaintiffs from determining what information has been withheld and prevents the Court from balancing the interests for disclosure.

Defendants' objection to preparing a privilege log also prevents Plaintiffs from determining which documents have been shared with third parties. Defendants' objection to preparing a privilege log for "documents exchanged between counsel for the parties and their respective clients once the litigation was initiated (August 12, 2013)," RFP Responses at 4, goes beyond the ESI agreement, which exempts from a privilege log privileged or protected documents created after August 12, 2013 "in connection with this litigation" that were exchanged between Defendants counsel and "any named defendant individual, organization, or agency in this case," *see* ESI agreement at 13. Defendants' refusal to create a log of documents for which they claim either legislative privilege or attorney-client privilege is particularly problematic in light of Defendants' inability or unwillingness to define or disclose precisely who they represent as a client. Without a definitive answer as to who defense counsel represents and a privilege log listing the custodian, author and recipient of documents, Plaintiffs cannot distinguish between documents exchanged exclusively between a legislator and his or her counsel and documents exchanged between counsel, a legislator represented by counsel, and

third parties.

Defendants' objection to creating or preparing a privilege log for "documents created or exchanged between legislators and their staff at any time" as shielded by "established doctrines of legislative immunity, privilege and confidentiality" also far overstates the bounds of confidentiality and privilege. Common law legislative privilege is less absolute when applied to legislative staff, than to legislators themselves. *See Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). In fact, North Carolina state law presumes some areas of disclosure by legislative employees. *See* N.C. Gen. Stat. § 120-132(c) (2010) ("Subject to G.S. 120-9, G.S. 120-133, and the common law of legislative privilege and legislative immunity, the presiding judge may compel disclosure of information acquired under subsection (a) of this section if in the judge's opinion, the disclosure is necessary to a proper administration of justice."). Federal common law privilege should provide the outer bounds of any privilege that applies for determining disclosure and should not be *more* restrictive than everyday disclosures to the public under state law.

IV. If Privilege Applied, It Would Be Qualified and Yield in This Case.

Even for those documents that are arguably protected by a legislative privilege, the application of such privilege to a request for documents must turn on the outcome of a balancing test that weighs the interests of the individual seeking the information against the interests of individual asserting the privilege. *See, e.g., Ala. Educ. Ass'n v. Bentley*, No. CV-11-S-761-NE, 2013 WL 124306, at *13 (N.D. Ala. Jan. 3, 2013) (explaining that the "legislative privilege is not absolute" and thus courts must "balance the various competing interests" to determine if the legislative privilege applies) (internal quotation marks omitted); *see also Favors*, 285 F.R.D. at 209 (explaining that "the legislative privilege for state lawmakers is, at best, one which is qualified" and "a court must balance of the interests of the party seeking the evidence against the

interests of the individual claiming privilege") (internal quotation marks omitted); *Rodriguez*, 293 F. Supp. 2d at 304 (affirming magistrate's analysis of legislative privilege, including that it is not absolute and determined by a balancing of interests).[2]

Among courts that have recognized some form of legislative privilege, the dominant view is that the privilege should be extremely narrow in cases where, as here, legislative intent is exactly what is at issue. *See Baldus*, 2011 WL 6122542, at *2 ("[L]egislative privilege does not apply in this case." (citing *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7)); *Rodriguez*, 280 F. Supp. 2d at 101-02 ("Legislative privilege . . . is not absolute. . . . Thus, courts have indicated that, notwithstanding their immunity from suit, legislators may, at times, be called upon to produce documents or testify at depositions"); *Ala. Educ. Ass'n*, 2013 WL 124306, at *13 (N.D. Ala. Jan. 3, 2013) ("Neither the executive nor the legislative deliberative process privilege is available when the governmental decision-making process is, itself, the subject of the litigation, or when the purpose of the disclosure is to expose governmental malfeasance"); *In re Subpoena Duces Tecum*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (finding that the deliberative process privilege is not applicable "when a plaintiff's cause of action turns on the government's intent"); *Doe*, 788 F. Supp. 2d at 984 (observing that "in most cases" state legislators have "a very narrow and qualified" privilege regarding requests for the production of documents).

[2] While federal common law defines the contours of any legislative privilege available in this action, the Supreme Court has noted that in determining whether privilege applies, the existence of a state law privilege is relevant. *See Gillock*, 445 U.S. at 368 & n.8. North Carolina takes an extraordinary limited view of legislative privilege as compared to other states. There is no competing state-created evidentiary privilege requiring expansion of a federal common law privilege. *See United States v. Cartledge*, 928 F.2d 93 (4th Cir. 1991); *see, e.g., Thomas v. City of Durham*, No. 1:98CV00706, 1999 WL 203453 (M.D.N.C. Apr. 6, 1999). North Carolina's grant of immunity is limited. In contrast to forty-three states, the North Carolina Constitution does not include a Speech and Debate Clause. Like only 5 other states, North Carolina does not even grant immunity to legislators from criminal prosecution. Federal common law privilege should provide the outer bounds of any privilege that applies for determining disclosure.

To determine whether the legislative privilege precludes disclosure, a court must balance the interest of the parties seeking the evidence against the interests of the individual claiming privilege. In Voting Rights Act challenges, the balancing test weighs heavily in favor of disclosure. Five factors guide this inquiry:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Rodriguez, 280 F. Supp. 2d at 100 (internal quotation marks omitted).

(i) Relevance: Evidence of legislative intent, such as decision-makers' motivations, justifications and rationales for enacting HB589, *see* RFP 2, are highly relevant to Plaintiffs' Voting Rights Act claim. *See United States v. Irvin*, 127 F.R.D. 169, 173 (C.D. Cal. 1989) (citing *Arlington Heights*, 429 U.S. at 268); *Rodriguez*, 280 F. Supp. 2d at 101-02 (citing *Arlington Heights*, 429 U.S. at 268); *Baldus*, 2011 WL 6122542, at *1 ("proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence in [Voting Rights Act] claims."). Plaintiffs seek documents considered by General Assembly members to assess the information available to legislators at the time they passed HB 589 and the circumstances surrounding the enactment of HB 589. *See, e.g.*, RFP 5 (requesting communications related to reports, studies, or analysis of proposed election related legislation); RFP 10 (requesting documents related to estimates, reports or analysis of HB 589's impact), RFP 18 (estimates or analysis relating to cost of administering elections pre-HB 589); RFP 17 (estimates or analysis relating to cost of administering elections following the enactment of HB 589). The information is highly relevant to plaintiffs' inquiry into legislative purpose.

(ii) Availability of other evidence: Direct evidence of the circumstances surrounding passage of HB 589, including the information assessed and actions taken by General Assembly members, is not available through other sources. Defendants have not only produced no documents in response to the RFPs, but have sought to prevent disclosure of nearly all evidence. Furthermore, as Plaintiffs set forth in their January 24, 2014 Motion to Compel, Defendants have objected to disclosing (i) nearly all documents created before the law was enacted, (ii) all documents created after the law was enacted and (iii) claimed legislative privilege for documents created during enactment from other actors, such as the State Board of Elections. *See* Defendants' Response to Plaintiffs RFP to SBOE. To the extent that documents sought were exchanged among legislators, among groups of legislators (including legislators not represented by counsel) and counsel, or between legislators and third parties, it is not otherwise identifiable without a privilege log and therefore not otherwise available to Plaintiffs.

(iii) Seriousness of claims: Litigation challenging discrimination in the fundamental right to vote tips heavily towards disclosure. *See ACORN v. Cnty. of Nassau*, No. 05-CV-2301, 2009 WL 2923435, at *4 (E.D.N.Y. Sept. 10, 2009) (defining the seriousness factor in relation to the "civil rights implicated"). Racial discrimination in voting contaminates the electoral process, where fairness is a precursor to the legitimacy of any law passed by that body. In particular when the rights of entire classes of persons are infringed through the legislative process and there is no recourse but through the courts, intent discovery strongly favors disclosure. Voting Rights Act and Equal Protection challenges, "raise serious charges about the fairness and impartiality of the central institutions of our state government." *Rodriguez*, 280 F. Supp. 2d at 102; *see also Favors*, 285 F.R.D. at 219; *Baldus*, 2011 WL 6122542 at *2; *Comm. for a Fair & Balanced Map*, 2011 WL 4837508 at *8.

(iv) Role of government: The state government's role in Voting Rights Act Section 2 litigation is direct. Like similar challenges, "the decisionmaking process . . . [itself] *is* the case." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8 (internal quotation marks omitted); *see also Rodriguez*, 280 F. Supp. 2d at 102.

(v) Future timidity: Concerns for inhibiting legislative deliberations in analogous legislative activity should weigh less heavily in Voting Rights Act cases because the intent behind passing the challenged legislation plays a different role than for example, a civil suit seeking legislators' documents to determine intent for the purposes of statutory construction. *See Baldus*, 2011 WL 6122542, at *2.

Finally, policy concerns supporting legislative privilege also weigh in favor of disclosure in voting rights discrimination cases. Unlike legislative privilege that "encourages the republican values it promotes" described by the Fourth Circuit, *see Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181, allowing legislators to claim broad privilege in voting rights cases would insulate legislators' exclusion of citizens from the democratic process. Without access to the relevant documents to protect their fundamental right to vote, plaintiffs have no adequate recourse to ensure their full and equal participation in the democratic process.

The Supreme Court has long held that privileges should not be "lightly created nor expansively construed for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Plaintiffs should not be denied access to relevant evidence, particularly in the context of a voting rights discrimination case where legislative purpose is central to the court's inquiry.

CONCLUSION

For the foregoing reasons, the LWV Plaintiffs respectfully request that the Court enter an

order requiring Defendants to produce:

(1) all documents responsive to Plaintiffs' requests for production; and

(2) a privilege log identifying documents which Defendants refuse to produce based on privilege and the specific grounds for that privilege.

Dated: February 7, 2014

Respectfully submitted,

By: */s/ Julie A. Ebenstein*

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 37.1

In accordance with Middle District of North Carolina Local Rule 37.1, Plaintiffs certify that the parties were not able to reach agreement on these matters after personal consultation and diligent attempts to resolve their differences. The parties have discussed these issues via email, including emails on January 9 and 16, 2014. The parties also held two meet-and-confer telephone conferences on these matters, on January 7, 2014, and on January 23, 2014. In attendance at the most recent conference were, among others, Bridget K. O'Connor, counsel for the NAACP Plaintiffs; Dale Ho, counsel for the LWV Plaintiffs; John Russ, counsel for the DOJ; and Tom Farr and Amy Pocklington, counsel for Defendants. During that meeting, the parties were unable to reach agreement on the issues discussed in this motion, save for that the Defendants' commitment to produce the databases at issue by January 31, 2014.

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2014, I served **Plaintiffs' Motion to Compel Production of Documents** with the Clerk of Court using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which on the same date sent notification of the filing to the following:

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